No. 16,175

United States Court of Appeals

For the Ninth Circuit

BARBARA LUELLA RIVERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEE.

ROGER G. CONNOR,
United States Attorney,
JEROME A. MOORE,
Assistant United States Attorney,
P. O. Box 1691, Juneau, Alaska,
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

Rules

Texts

No. 16,175

United States Court of Appeals
For the Ninth Circuit

Barbara Luella Rivers,	*Appellant,*
vs.	
United States of America,	*Appellee.*

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted after a jury trial and a verdict of guilty in the District Court for the District of Alaska, First Division, at Juneau, the Honorable Raymond J. Kelly presiding, of one count of murder in the first degree. Appellant was sentenced to life imprisonment. Appellant filed notice of appeal from the judgment and commitment and from the order denying a new trial.

Jurisdiction below was based on 48 U.S.C. §101, and in this court is based on 28 U.S.C. §1291.

STATEMENT OF CASE.

Appellant was convicted of murdering her husband, Paul Rivers, on the night of December 3rd or early morning of December 4th of 1957. She and her husband had arrived in Sitka, Alaska, on November 27, 1957, and were living in Room No. 10 in the Alaskan Hotel (R. 156).

On December 5, 1958, at about 11:30 p.m. appellant made an "anonymous" telephone call to the Sitka police department from the pay station in the Alaskan Hotel, stating that a man had been murdered, his body dismembered, and the parts thrown into the ocean (R. 4-5, 50-52, 158, 533-534). A search was made by the police officers on duty, and portions of a human body were found in a place where the tide had gone out (R. 10-12, 53-56). The parts found at that time were two lower legs, with toes cut off, one lower arm with fingertips missing, and a head in a pillowcase with the scalp, eyebrows, and lips removed, and a severed torso (R. 12, 55). Other help was summoned (R. 12), and investigation continued. About an hour after the telephone call appellant was seen near the Alaskan Hotel and upon being asked whether she had made a call to the police at 11:30, said that she had not (R. 13-14). Shortly after that she stopped some other officers and said that she had made a call about a dog, and questioned the officers about what had happened (R. 79, 81-82, 109-110).

At about 2:30 a.m., December 6th, the law enforcement officers went to appellant's room in the Alaskan

Hotel. She consented to them looking over the room, and at that time the officers saw no demonstrative evidence that appeared to be of value. When asked about her husband, Paul Rivers, appellant said that she had not seen him since December 3rd, about 10:00 at night, when he had left after having an argument (R. 16-20, 57-59, 83-85). Appellant later stated to witness Dankworth that she had last seen her husband at 9:30 a.m. on December 4th (R. 118-119). When the officers told appellant that a body had been found she volunteered to go to the morgue to see whether it might be her husband, and became quite insistent upon doing so (R. 19-20, 59, 85-86). When she got to the morgue and viewed the remains she became quite hysterical so that it was necessary to obtain medical attention for her. While waiting for the doctor appellant related some of the marks on her husband which would establish identification (R. 27-30, 60-63, 87-89). At 7:00 a.m. she was arrested for disorderly conduct (R. 93). She was arraigned on this charge at 3:00 p.m. December 6th and again at 3:45 p.m. December 7th (R. 94).

In the meantime the investigation continued. Additional pieces of the body were found, and a number of articles were found in Room 10 of the Alaskan Hotel, as well as in the surrounding area (R. 32-38, 42-43, 63-70, 111-113, 130, 140-144, 160-161).

A pathologist arrived in Sitka on December 7th, examined the remains that had been found (R. 213-221), and established the cause of death as an acute sudden asphyxiation (R. 222-227).

At 2:00 a.m. December 8th, the appellant, upon being confronted with some of the findings and being interrogated in the presence of several persons, made an oral statement that she had killed Paul Rivers, that she had put a string around his neck (R. 124-129, 198-199, 241-242), and that when she woke up on the morning of December 4th she found him dead. On December 9th at 2:00 p.m. appellant was charged with first degree murder, and was advised of her rights by the United States Commissioner (R. 95). On December 10th she signed a written statement (R. 150-152, 155-159, 202-203), entered in evidence as Exhibit No. 32.

At the trial the above matters were all brought out in the testimony of the witnesses. It was also shown that the victim, Paul Rivers, had been attended by a Dr. Knoll on the night of December 3rd, and the drugs given to him were explained (R. 257-273, 279-281, 299-303, 305-306, 361-366).

It was shown that, contrary to her story that she had been asleep from the late night of December 3rd till the morning of the 4th, she was in fact very active around the hotel, and her activities the next day were related (R. 423, 424-425, 429-432).

The head of the deceased, found with other large dismembered parts of the body, and the severed fingertips found behind the Alaskan Hotel were proved to be those of Paul Rivers (R. 35-38, 66-67, 205, 354-356, 79, 366, 370, 417). It was shown that stocking-shoes with stains on them and particles of blood, meat, and hairs were found below the window of the

room occupied by appellant (R. 32-33). One loose clothing label was found in her room (R. 141, 143). Articles of clothing were found in the water behind the Alaskan Hotel, some of which had stains on them and some of which had the labels and laundry marks cut out of them (R. 67-70). Numerous objects were found in appellant's room indicating that a dismemberment of the body had taken place there (R. 42-43, 63-64, 111-113, 130, 140-144, 160-161).

Wet sheets with blood stains on them were thrown down the clothes chute in the hotel the day after the homicide (R. 113, 392-394, 395-398, 399-405). She was seen carrying clothes out of the hotel after the homicide (R. 384). When asked by hotel employees about throwing the wet sheets down the clothes chute she said that her husband had had a bowel movement on the sheets and she had washed them out for that reason (R. 397-398, 404-405).

It was shown that she bought a cleaver type of fish knife at the hardware store the afternoon of December 4th (R. 379-381). Appellant later directed the officers to the place where she had thrown the knife in the water, and it was recovered (R. 95-99, 71-73).

One witness testified that appellant told him on the 4th and again on the 5th of December that Paul Rivers was sick in bed (R. 373-375, 375-377). She told another witness the same thing on December 5th (R. 367-368).

Psychiatric testimony bearing on appellant's sanity was adduced (R. 330-352).

Appellant testified at length about various marital troubles that had taken place between her and Paul Rivers, and stated that she had tied a piece of string around his neck in the late night of December 3rd because she was afraid he would wake up during the night and harm her, that she went to bed and did not wake up until morning, whereupon she found her husband dead, and, that being frightened because it might appear that she had intentionally killed him, she dismembered the body and disposed of it (R. 437-521).

Medical testimony was also presented on behalf of appellant (R. 568-595).

SUMMARY OF ARGUMENT.

I. It was not error for the court to foreclose appellant's counsel from asking a particular question of the prospective jurors on voir dire examination.

II. It was not error for the court to admit into evidence Exhibits Nos. 14, 18, and Exhibits Nos. 35 through 41.

III. The verdict is fully supported by the evidence.

IV. The length of the court sessions during appellant's trial did not constitute error.

V. The trial court properly excluded testimony concerning the character of the deceased and was justified in instructing the jury not to consider the doctrine of self-defense.

VI. It was not error for the court to give Instruction No. 12.

VII. The court's Instruction No. 25 that evidence of prior inconsistent statements of the accused are not sufficient of themselves to prove guilt was a correct and proper statement of the law.

VIII. The admission of testimony about oral statements made by appellant was not error.

IX. There was no reversible error in admitting into evidence various articles taken from Room No. 10 of the Alaskan Hotel.

ARGUMENT.

I. IT WAS NOT ERROR FOR THE COURT TO FORECLOSE APPELLANT'S COUNSEL FROM ASKING A PARTICULAR QUESTION OF THE PROSPECTIVE JURORS ON VOIR DIRE EXAMINATION.

The court did not foreclose appellant's counsel from questioning the prospective jurors about their possible racial prejudice as it might affect their consideration of the case. What counsel is complaining of is the denial of the right to ask the particular question put. The question, "Would you object to a negro living in an apartment next to yours," was one which the court in its sound discretion had the power to control.

All voir dire questioning is under the control of the court by virtue of Rule 24, F.R.Cr.P., and considerable discretion is vested in the trial judge as to the extent of such questioning. *Fredrick v. United States,* 163 F.2d 536, 550 (9 Cir. 1947), cert. den. 332 U.S.

775; *Speak v. United States,* 161 F.2d 562, 563; *United States v. Dennis,* 183 F.2d 201, 226-228 (2 Cir. 1950), affirmed 341 U.S. 494; *Butler v. United States,* 191 F.2d 433, 435 (4 Cir. 1951); *Hamer v. United States,* 259 F.2d 274 (9 Cir. 1958). It is possible, in fact not unlikely, that a juror might object to a negro living next to him in an apartment but would still be able to afford a negro a fair trial. It should not be presumed that jurors who in every respect have been adequately examined on voir dire will violate their oaths and the instructions of the court.

The cases cited by the appellant do not apply to the situation at bar. In *Aldridge v. United States,* 283 U.S. 308 (1931); *State v. McAfee,* 64 N.C. 339 (N.C. 1870), and *State v. Higgs,* 120 A.2d 152 (Conn. 1956), the defendants' convictions were reversed because they had been entirely foreclosed from inquiring into the possible racial prejudice of prospective jurors. Appellant states that the extent of the voir dire examination concerning racial prejudice is subject to considerable variation (p. 16 of appellant's brief), but he cites no case and our research reveals none in which a conviction was reversed for any restriction of the voir dire examination short of a complete denial of questioning on that subject. See 54 ALR 2nd 1204.

Appellant's counsel is not claiming that he was in any other respect hindered from conducting a proper and searching voir dire examination, or that the court excluded any other form of question relating to possible race prejudice. It is difficult to see how the

exclusion of this one question, without more, could constitute reversible error.

II. IT WAS NOT ERROR FOR THE COURT TO ADMIT INTO EVIDENCE EXHIBITS NOS. 14, 18, AND EXHIBITS NOS. 35 THROUGH 41.

The burden of appellant's argument is that the above-mentioned exhibits should not have been admitted in evidence because (1) they were inflammatory and gruesome, (2) they were irrelevant, and (3) defense counsel was willing at trial to stipulate to many of the facts that the exhibits were used to demonstrate.

A considerable part of appellant's brief on these points consists of matters that would be proper jury argument but which have little to do with the questions of law arising in the case. For convenience, the three forms of demonstrative evidence objected to will be taken up below, although the arguments tend to overlap in certain instances.

A. Exhibit No. 18: The jar containing severed fingertips of the deceased.

During the search to recover parts of the dismembered body of the deceased some fingertips were found behind the Alaskan Hotel in Sitka (R. 35-38, 66-67, 205), which had been occupied by the defendant and the deceased until the killing. Witness Dankworth testified that he obtained fingerprints from these parts by rolling them on a standard fingerprint card (R. 119-122) and transmitted it to his superiors (R. 161).

The fingerprint card was admitted in evidence as Exhibit No. 17, which was later connected up by witnesses Mayfield (R. 209) and Hippensteel, the FBI fingerprint examiner (R. 354). The examiner testified (R. 354-356) to the identity of the prints with those found on Exhibit No. 42 (also No. 23 for identification), which was a fingerprint card of the deceased already on file with the FBI, containing a photograph of Paul Rivers. The photograph on Exhibit No. 42 showed a mole on the face which corresponded with a mole visible in several of the photographs of the dismembered head of the body found by the enforcement officers. The person whose photograph appeared on Exhibit No. 42 was identified by four witnesses as the Paul Rivers they knew in Sitka, Alaska, during the week before the dismembered body was found (R. 79, 366, 370, 417).

The fingertips were thus an integral part of a chain of evidence leading to the identification of the victim, proving also that a dismemberment of the victim had occurred, and that certain of the dismembered parts had been disposed of behind the hotel occupied by the appellant. The exhibit was relevant in that it aided in the establishing of both the corpus delicti and identity, the burden of proving which rested squarely on the government. Exhibit No. 18 supported the testimony of the witnesses that the fingertips were in fact found, and that they were the very fingertips from which fingerprints were obtained. Like most demonstrative evidence, it gave authenticity to the oral testimony. Without the exhibit the testimony could have

been attacked on the grounds that the fingertips and the prints taken from them were fictitious, that there was uncertainty about the custody of the fingertips after they were found, or that the fingertips were in such condition that fingerprints could not have been obtained from them.

The fact that the fingertips, preserved in formalin in a glass jar, were part of the deceased's body is no ground for their exclusion. In addition to the cases cited later in this brief dealing with the problem of inflammatory photographs, the following homicide cases are ones in which the reception in evidence of parts of the human body has been upheld: *Thrawley v. State,* 55 NE 95 (Ind. 1889); *Savary v. State,* 87 NW 34 (Neb. 1901); *State v. Gaines,* 258 P. 508 (Wash. 1927), writ of error dismissed and cert. den. 277 U.S. 81; *State v. Rodriguez,* 167 P. 426 (N.M. 1917); *State v. Byrne,* 199 P. 262 (Mont. 1921), holding it proper to submit the skull of the deceased to the jury; *State v. Wieners,* 66 Mo. 13, 29 (Mo. 1877); *Turner v. State,* 15 SW 838 (Tenn. 1891), holding it permissible to introduce vertebral bones and ribs. In *State v. Vincent,* 24 Iowa 570 (Iowa 1868), when the victim's body was found the head had been severed from it. A physician preserved the head in alcohol, and at the trial the head was exhibited to the jury. Various witnesses identified the head as that of the deceased. The court apparently felt that no impropriety was involved in that procedure.

In the case at bar it is highly unlikely that the jury would disregard the instructions of the court

and find appellant guilty because of the introduction of this exhibit. Its role was a minor one, but, like all circumstantial evidence, important in its relation to the other facts in the case.

It should be noted that appellant's counsel made no motion to strike the exhibit at the close of the evidence, a procedure which was open to him if he felt that the exhibit was irrelevant or prejudicial to the appellant.

B. Exhibit No. 14, the box of clothing.

Witness Greenhalgh testified that a few days after the homicide he found assorted articles of clothing in the water on the beach behind the hotel occupied by appellant (R. 67). Some of the clothes had stains on them, and some had the labels and laundry marks apparently cut out of them (R. 68-70).

Appellant's argument seems to go to the evidentiary weight to be given to the exhibit rather than its admissibility. A trier of fact might have attached no significance to the clothing with the labels removed. But it could also be rationally inferred that such clothing, found where other portions of the body were found, had been dumped in the water by appellant in an effort to destroy evidence of a crime having been committed. As such it was entitled to be considered by the jury.

When the exhibit is considered with the other evidence in the case it is an understatement to say that it had some materiality. Stocking-shoes with stains on them and particles of blood, meat, and hairs were

found below the window of the room occupied by appellant (R. 32-33). One loose clothing label was found in her room (R. 141, 143). Fingertips, a toe, and an upper arm were found on the beach behind the hotel (R. 35-38, 66-67). Numerous objects were found in appellant's hotel room indicating that a dismemberment of the body took place there (R. 42-43, 63-64, 111-113, 130, 140-144, 160-161). She was seen carrying some clothes out of the hotel after the homicide (R. 384). Wet sheets with blood stains on them were thrown down the clothes chute in the hotel the day after the homicide (R. 113, 392-394, 395-398, 399-405).

Appellant now complains that the clothing was not shown to have belonged to the deceased. It was open to defense counsel to hand this clothing to appellant when she took the witness stand and have her testify concerning it, if that was desired, but this was not done. Counsel objected to the introduction of the exhibit but failed to state any recognizable reason for its exclusion, the objection in its entirety reading as follows:

> "Well, your Honor, I am going to object to that. It seems to me that by searching a quarter of a mile of beach they could have picked up almost anything around that area." (R. 71.)

It is unfair to the trial court to claim error when the court has not been apprised by a proper objection of the grounds upon which the evidence is claimed to be inadmissible. *Finnegan v. United States,* 204 F. 2d 105 (C.A. 8th 1953), cert. den. 346 U.S. 821; *Kreinbring v. United States,* 216 F. 2d 671 (C.A. 8th 1954).

C. Exhibits Nos. 35 through 41, photographs of the dismembered body of the homicide victim.

Appellant claims that there was no necessity to introduce these exhibits, which show various portions of the body of Paul Rivers during the post-mortem examination conducted by a pathologist who testified at trial, because either the facts proven by the photographs were not in dispute or counsel was willing to stipulate to the facts shown in them.

Defense counsel's offer to stipulate is of little consequence. A criminal trial becomes meaningless if the defendant can stipulate to all facts he does not want to have shown in evidence against him. The government is in no position in a criminal trial to stipulate to difficult fact patterns, nor can it very well determine in advance what quantum of proof will satisfy a jury beyond a reasonable doubt.

> "Evidence of facts which in themselves are relevant to the guilt of the accused are not inadmissible because he admits, or offers to admit, that such facts are true. The right of the state to offer, and to have received, evidence which is relevant and material to the issue can not be taken away by such offer or admission." *State v. Morgan,* 176 NW 35 (S.D. 1920), at 36.

Dean Wigmore's penetrating analysis of this problem is particularly helpful:

> "Nevertheless, a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate *moral force of his evidence;* furthermore, a judicial admission may be cleverly made with grudging limitations or

> evasions or insinuations (especially in criminal cases), so as to be technically but not practically a waiver of proof. Hence, there should be no absolute rule on the subject; and the trial Court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances." 9 Wigmore, Evidence, 3rd Ed., §2591, p. 589. (Emphasis in the original.)

One of the leading cases on the admission of gruesome photographs is *Hawkins v. State,* 37 NE 2d 79 (Ind. 1941), a murder case. The objects shown in the admitted photographs were (1) the taxicab in which the crime had been committed, showing blood on the floor, (2) the decomposed body of the victim, lying in grass or weeds, with the hands tied behind the back, and (3) the skull of the victim, with skin and flesh removed, showing a hole and fracture in the skull. The defense counsel had offered to admit that the body was that of the alleged victim, and objected to the photographs on the grounds that they did not portray the taxicab or body in the condition they were in at the time of the crime, that they were admitted in evidence to prove that which was admitted by the defense, and that the gruesomeness of the pictures prejudiced the jury.

The court stated that the relevancy of such exhibits is determined by the inquiry as to whether or not a witness would be permitted to describe the objects photographed. Because there was no objection made to the testimony of all the facts shown in the photo-

graphs, the court held that there was no error in their admission. The court found no reason why a party should be limited in its presentation of facts. A witness may describe in words what he saw and also supplement his testimony with photographs, which frequently give a more accurate picture than the verbal description.

The fact that the defense had offered to stipulate the corpus delicti illustrated by the photos was also held not to be a ground for reversal. With the burden resting on the government of proving every element of its case, it is important for the government to be able to make its case in its own way. The evidence may be important in proving matters beyond the scope of the stipulation. The court also noted that at the time the defense counsel offered to stipulate no element of the crime was admitted by the defense. An admission of the corpus delicti was not an admission that the defendant was the person who had committed the offense.

On the issue of gruesomeness the court found no error. It pointed out that details more repulsive than those shown in the photos might legitimately have been told by witnesses, such as the stench of human flesh putrefying under a hot May sun.

There are many similarities between the *Hawkins* case and the case at bar. In the instant case the photographs went to prove identity, the concealing of a crime, the state of mind of the defendant, and the environment and pattern of the crime. Likewise, the admissions tendered by appellant's counsel at trial

were not admissions that the defendant had cut the body up, or that she did it to escape justice, or that it was the victim who was cut up, or that defendant was sane when she did such acts. Appellant's counsel did not object to the testimony about the dismembered body, but only the photographs that illustrated that testimony.

Instead of operating as a foundation for the exhibits, appellant claims that the testimony about the dismembered body eliminated the necessity for the introduction of the pictures. But it is interesting to see what other courts have said in similar situations. In *State v. Nelson,* 92 P. 2d 182 (Ore. 1939), although an eminent pathologist had already described a bullet wound in the back of deceased, using charts, plates and diagrams to illustrate his testimony, a photograph of the wound was admissible, despite its gruesome character. In *State v. Lantzer,* 99 P. 2d 73 (Wyo. 1940), a photograph of a murdered wife lying on her back in a pool of blood was held properly admitted, even assuming that the defendant would not contest the facts shown in the photograph. *State v. Woods,* 220 P. 215 (Utah 1923), was a prosecution for wife murder in which it was held that a photograph of a bedroom showing the burned body of the wife on a bed was admissible, even though it was a repetition of the oral testimony and was gruesome in nature.

Appellant complains that the photographs did not directly establish the cause of death, because they depicted a dismemberment that took place after death, and thus they were irrelevant. But the authorities

support the proposition that the other conduct of the accused accompanying the commission of a crime may be shown so that the jury will have an adequate understanding of what took place. In *Hicks v. State,* 11 NE 2d 171 (Ind. 1937), reh. den. 12 NE 2d 501, cert. den. 304 U.S. 564, the court found no error in admitting a photograph of the head and hands of deceased which had been cut off the body with a meat cleaver. The hands and head had been thrown in a pond far away from the torso in effort to destroy identity. The head had been badly beaten, bruised, and crushed. The nose was broken off and was barely attached to the face. The forehead was mashed and crushed in. There was a hole in the temple and one between the eyes.

In *Commonwealth v. Sydlosky,* 158 A. 154 (Pa. 1931), it was held proper to admit a photograph of a murdered baby which had been killed by garrotting, after which the hands and feet were cut off to prevent identification. The picture was in aid of the oral testimony in the case and also helped establish identity of the victim. *State v. Williams,* 192 NW 901 (Iowa 1923), was a prosecution of a negro for the murder of a woman school teacher. The body of the victim had been violated after death, and photographs of the body and head of the deceased were held admissible to show the environment of the offense and the motive for the crime.

State v. Fine, 164 A. 433 (N.J. 1933), was a murder in which the body was stuffed inside a trunk and shipped by express from Atlantic City to Philadel-

phia. The body was identified and it was undenied that death had been caused by strangulation, a rope having been used for that purpose. A series of photographs showing the trunk and the body were put in evidence over the objection of counsel. The court said:

> "The fact that counsel could not see the purpose naturally does not make the photograph incompetent. We think it was both relevant and competent, as a question of identification and part of the evidence to establish the corpus delicti. It is true that there was other testimony as to whose body it was and how death had been caused, but the fact that this evidence was cumulative does not render it incompetent, nor does the fact that it happens to be gruesome and injects an element of horror into the case." 164 A. at 434.

It is certainly not the horror conjured up by such exhibits that renders them inadmissible. In *State v. Smith,* 83 P. 2d 749 (Wash. 1938), a photograph of deceased's head, taken when the body was exhumed four months after death, was held proper. The danger in excluding evidence on the mere ground that it is inflammatory is that the more horrible the murder the more hampered would be the prosecution of those responsible. See *People v. Saenz,* 195 P. 442 (Cal. App. 1920). As the court in *State v. Aeschbach,* 153 A. 505 (N.J. 1931), in which an inflammatory photograph of the murder scene was held admissible, so aptly said:

> "Carrying this contention to its logical conclusion, a court of first instance, on trial of an indictment for murder, is barred from admitting proof of any material fact which would tend to

> inject an element of horror into the case, and so embitter and inflame a jury against the defendant, although without such proof the state would be unable to support the charge laid in the indictment. We conclude that this contention is without merit." 153 A. at 506.

In the case at bar the government had the burden of proving the identity of the dismembered body. The photographs show a mole on the face as well as other physical characteristics that match the victim. The mole on the face is also visible in Exhibit No. 42, the FBI fingerprint sheet on Paul Rivers, and this photo was declared by four witnesses (R. 79, 366, 370, 417) to be that of the Paul Rivers who lived in Sitka before the murder. From a mere verbal description of the mole on the dismembered head the jury would have had a greater foundation for doubt about the identity of the victim.

The exhibits demonstrated, together with all the other evidence, an attempt by appellant to destroy the identity of the deceased in an effort to escape detection. That is positive evidence of conduct showing guilty knowledge which the jury was entitled to consider. The evidence also showed that the large pieces of the body were disposed of in one area, while the portions relating to identity, such as eyebrows, scalp, fingertips and toes, were found in a place almost a half-mile away. The photographs went to the proof of that very important fact.

The exhibits bore upon the issue of sanity. They show a crude but effective dismemberment for the

purpose of escaping detection. When taken with the other evidence they lead to an inference of a cold-blooded disposition of the body and not an insane mutilation.

The photographs are corroborative of the fact that a cleaver was used to cut up the body. They also show what the pathologist had to work with in establishing the cause of death, and thus they explain why his findings were made as they were. They show that it was physically possible for the appellant to take these parts of the body out of the hotel room and dispose of them without being detected.

This catalog of reasons for the admission of these exhibits should suffice, but there are additional reasons why it was not error for the court to so act. Counsel for appellant did not move to strike the evidence at the close of trial. The court eliminated the possibility of the jury finding appellant guilty of murder because of the mere fact of dismemberment by giving Instruction No. 15, which reads as follows:

> "The dismemberment of the body may be considered by you as bearing upon the question of malice, intent, and in connection with the possible consciousness of guilt, but the defendant is not charged here with any crime in connection with the act of dismembering the body."

If anything, there is too much fear of juries being inflamed by various types of demonstrative evidence. A murder trial as lengthy as this one is conducted in an orderly fashion, and the gruesome details of the crime are developed and considered in what might

best be described as a clinical atmosphere, not one of muckraking. The jury was admonished throughout to consider the case on its merits and according to the evidence.

Apparently appellant believes that the more ghoulish the crime and the more cunningly it is perpetrated, the greater is the immunity from proof. It is submitted that such a principle is fundamentally wrong and erroneous.

III. THE VERDICT IS FULLY SUPPORTED BY THE EVIDENCE.

Reference is made here to appellee's statement of the case. As pointed out there, the jury had before it the evidence of the dismemberment of the body, the locations in which the body parts were found, the removal of identifying marks from the body, the conflicting stories told by the appellant after the killing, the written statement of appellant, medical evidence that the cause of death was sudden acute asphyxiation, psychiatric testimony on the issue of sanity, considerable circumstantial evidence of the appearance of the crime scene, evidence of the identity of the dismembered corpse, and the benefit of appellant's own testimony and demeanor on the witness stand.

Appellant claims that deceased might have died from drugs administered to the deceased shortly before his death. But these matters were fully developed during the trial and were resolved by the jury in favor of guilt.

IV. THE LENGTH OF THE COURT SESSIONS DURING APPELLANT'S TRIAL DID NOT CONSTITUTE ERROR.

Appellant claims that lengthened court sessions and a night session during the trial deprived her of a fair trial. The cases cited in appellant's brief do not support the proposition put forth. *State v. Belknap,* 19 SE 507 (W.Va. 1894), cited by appellant, holds that it was not error to have a night session during a criminal trial because there was no showing of how it prejudiced the rights of the accused. *State v. Smart,* 262 P. 158 (Mont. 1927), cited by appellant, held it error for the judge to refuse to correct a serious misstatement about the evidence in the case in the final argument of the prosecuting attorney, and noted that the length of the court session (which ran from 8 a.m. till noon, from 1:15 p.m. till 6 p.m., and from 7:15 p.m. till 10 p.m.) made the error more serious. The other citation given by appellant, 22 CJS 732-734, deals with the time to prepare in advance of trial and is clearly inapplicable.

A trial court in the exercise of its discretion may hold longer sessions than is customary, if the rights of the accused are not prejudiced thereby. *State v. Evans,* 25 SE 2d 492 (S.C. 1943). In a murder case, *Bingham v. State,* 165 P. 2d 646 (Okla. 1946), the court said that before a verdict should be set aside because of night sessions during trial it must be clearly shown that such action resulted prejudicially to the defendant and constituted an abuse of discretion.

It is submitted that in the case at bar there is nothing, with the exception of the assertions of counsel

made in their briefs, to indicate prejudice to the defendant arising from this cause. The objection of counsel (R. 510) is nebulous and states no concrete reasons why a night session should not be held, and no statement or showing of the harm resulting to counsel can be found in the record. It is patently unfair to the trial court to claim error on appeal by statements dehors the record when the court was not given an adequate opportunity to perceive the claimed error.

V. THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY CONCERNING THE CHARACTER OF THE DECEASED AND WAS JUSTIFIED IN INSTRUCTING THE JURY NOT TO CONSIDER THE DOCTRINE OF SELF-DEFENSE.

Error is claimed in the exclusion of evidence concerning the character of Paul Rivers and the court's instruction that the doctrine of self-defense was not applicable. For convenience these related topics will be treated as one.

A. The doctrine of self-defense did not apply.

The court's definition of the doctrine of self-defense in Instruction No. 14 is clearly in accord with the authorities in Alaska and throughout the United States. Compare *Owens v. United States,* 130 F. 279, 280-283 (9 Cir. 1904), an appeal from the Third Judicial Division of the District of Alaska; 26 Am. Jur., Homicide, §126; and Moreland, *The Law of Homicide,* p. 259 (1952), with the language used by the trial judge:

"The doctrine of self-defense may be invoked by one who, having been assaulted by another, reasonably believes himself to be in imminent danger of death or of receiving great bodily harm, and who uses whatever force is necessary to prevent such harm."

It is equally clear that the doctrine had no application in this case. Mrs. Rivers testified that a fight took place in their room on the night of the killing, and after describing the manner in which she placed her husband on the bed and his final abusive remarks to her (R. 488), she stated:

"I was afraid he would wake up before me.

"So, around this pasteboard box in the room was some string that he had wrapped the boxes to take to Juneau, to take to Sitka from Juneau. These pieces of string I had put in the dresser drawer, and I thought to tie his hands so, if he did awaken, he wouldn't kill me, and I was scared to death. Then I thought that, if I didn't tie him otherwise, he would probably raise up and untie his hands, so I got a short piece of string and I brought it around his neck and I crossed it here, and it was an iron bed and it had round rods in it, like that, and I took it and tied it around the back of the rod, and I tied his hands together."

Therefore it was affirmatively shown that the deceased had committed no overt act from which the appellant could have reasonably apprehended imminent danger to herself.

An analogous case is *Morrell v. State,* 34 So. 208 (Ala. 1903), wherein the deceased, angered by his

wife's failure to have dinner prepared when he arrived home, loaded a gun in the wife's presence and directed her to finish attending to their child, after which he intended to kill her and himself. The husband lay down on a pallet on the floor with the gun beside him and continued to abuse her verbally. Later, after he had fallen asleep, the wife picked up the gun, stepped back and shot her husband fatally. In affirming the wife's conviction of first degree murder the court said:

> "The undisputed evidence shows the deceased, when shot, was either asleep, or was lying down quietly; that he was then making no hostile demonstration toward the defendant; and that the defendant had opportunity to escape from any immediate danger she may have had reason to apprehend. Under such evidence no question of self-defense arose . . ." 34 So. at p. 208.

In addition, the theory of the defense was that Paul Rivers' death was accidental (R. 488-493), and this court held such a theory to be inconsistent with self-defense in *Itow v. United States,* 223 F. 25 (9 Cir. 1915), appeal dismissed 233 U.S. 581.

The present case is similar in some respects to the case of *State v. Rawley,* 74 SE 2d 620 (N.Car. 1953). The defendant, while engaged in a fight with her boy friend, seized a knife and killed him. She testified that she did not consider the danger grave enough that it was necessary for her to "cut him," but that he had accidentally fallen on the knife. The trial court's instruction that the doctrine of self-defense

had no application under the facts of that case was approved.

In view of the testimony of the appellant, which precludes any claim of self-defense in this case, the court properly stated in Instruction No. 14 that the doctrine of self-defense was not to be considered by the jury.

B. Evidence of the deceased's character was inadmissible.

Initially it should be pointed out that even if the appellant were correct on the substantive question of law involved, the offer of proof was inadequate to enable the trial court or this court to make a determination whether the offered testimony was admissible.

In *Wigmore on Evidence,* 3rd Ed., 1940, it is stated that

> "The general principle is that the offer must be judged *exclusively by its specific contents* regarded as a whole. This principle leads to several consequences:
>
> (1) If the evidentiary fact desired to be offered is in itself apparently irrelevant, or otherwise dependent on other facts for its admissibility, the offer must contain a statement of the *specific purpose,* or of all the *other facts necessary to* admissibility. . . ." Vol. I, §17, p. 319. (Emphasis in the original.)

Even in the absence of the other reasons for excluding evidence of the deceased's character, appellant would certainly be obliged to show specifically how

the evidence bears on the issue of intent, and that the incidents were not so remote as to have no probative value. But the only indication of what the evidence would have been was counsel's statement that it would "consist of evidence of assaults upon her, evidence of showing her degree of her fear toward him, and evidence of that particular sort, threats made against her" (R. 538, 539). Not even the approximate date of these incidents is suggested. We contend that the offer was therefore insufficient to enable appellant to allege error in its rejection.

But more importantly, the trial court correctly ruled that evidence such as that which was offered would be inadmissible in any event, in view of the facts of this case. The authorities on evidence are in accord that the character of the deceased in a homicide prosecution is immaterial unless a claim of self-defense is made and (1) there is a dispute as to whether the deceased or the defendant was the aggressor, or (2) evidence of such character would tend to establish the defendant's reasonable apprehension of imminent danger, based upon some overt act of the deceased. Wigmore, *op. cit.* §63 and §246; *McCormick on Evidence,* §160, 1954; 3 *Underhill's Criminal Evidence,* 5th Ed., 1957, §647; 1 *Wharton's Criminal Evidence,* 12th Ed., 1955, §217. See also *Andersen v. United States,* 170 U.S. 481 (1897); *Morrell v. State,* supra, 34 So. at pp. 208, 209; and *State v. Rawley,* supra, 74 SE 2d at pp. 623, 624. Since self-defense was not available to the appellant in this case, the trial court properly excluded evidence of Paul Rivers'

bad character. Wigmore states the reason for the foregoing rule as follows:

> ". . . the unconditional and indiscriminate admission of such evidence is dangerous. The danger is, not only that the deceased's reputed character, once in evidence, will be appealed to as justifying the deliberate destruction by private hands of a detested malefactor, but also that, though no plausible situation of self-defense is otherwise evidenced, this evidence will be improperly used to confuse the issue as if there were real doubt about the necessity for defense and the apprehension of danger." Vol. II, §246, pp. 46, 47.

Furthermore, even if a self-defense situation had existed, we believe that the proposed testimony was inadmissible because it was to consist of specific acts of misconduct of the deceased rather than his reputation for violence (R. 538, 539). There are no decisions from Alaskan courts defining the manner in which the deceased's character may be shown, but the weight of authority confines evidence of that nature to the reputation of the deceased for violence. The reasons for the rule are that (1) evidence of reputation is less likely to divert the jury's attention from the essential issues, (2) specific acts are not always typical of the deceased's conduct, and (3) the burden of refuting incorrect evidence of specific misconduct is often insurmountable. See *Burton v. State,* 163 SW 2d 160, 162 (Ark. 1942); *Newsome v. State,* 20 So. 2d 708 (Miss. 1945); *Andrews v. State,* 43 SE 852, 853 (Ga. 1903); *State v. Ronk,* 98 NW 334, 339 (Minn. 1904); *People v. Gaimari,* 68 NE 112, 116 (N.Y. 1903).

Even in the absence of the general rule excluding evidence of the deceased's character, the offered testimony would be objectionable on the ground of immateriality. The probative value of such evidence would indeed be slight, and when weighed against the possibility that it would confuse the jury, we submit that the latter consideration should prevail and the evidence should be held inadmissible. Similar offers of evidence have been rejected in *Simms v. United States,* 248 F. 2d 626 (D.C. Cir. 1957), cert. den. 355 U.S. 875, and *Sanford v. State,* 47 SE 2d 268 (Ga. 1948).

In the former case the defendant and two accomplices administered a fatal beating to the defendant's husband, and error was claimed in the exclusion of a hospital record which reflected that five months prior to the killing the defendant told a doctor or a nurse that her husband had pushed her through a window. The court stated:

> "Whether or not her husband pushed her through a window in October is totally immaterial to the issue of his death resultant to a beating at her hands the following March." 248 F. 2d at p. 630.

In the *Sanford* case, the deceased struck the defendant on the head with a milk bottle during an argument. Later the defendant returned to the deceased's house and killed him with a shotgun. He claimed to have been carrying the gun merely to protect himself in case of further violence. Following a conviction of murder, the defendant alleged error in the exclusion of evidence that he usually walked by the de-

ceased's house on his way to a cafe where he bought dinner for his invalid wife. The court stated:

> "It is insisted that the exclusion of this evidence was hurtful and prejudicial to the defendant because it would show that he was on lawful business when passing near the home of the deceased and would tend to disprove the contentions of the State that the defendant went to the home of the deceased for the purpose of committing homicide.
>
> "If the witness had been allowed to testify and if she had testified as claimed by the defendant, her testimony would not have proved the contentions of the defendant. The fact that it was the usual custom of the defendant to pass by the home of the deceased on his way to procure food for his invalid wife would not have been sufficient to show that he was near the home of the deceased on this particular occasion, armed with a shotgun, for that purpose." 47 SE 2d at p. 269.

For the foregoing reasons the trial court's ruling that evidence of the deceased's character was inadmissible should be upheld.

VI. IT WAS NOT ERROR FOR THE COURT TO GIVE INSTRUCTION NO. 12.

The court gave Instruction No. 12, which reads as follows:

> "Every person is presumed to be of sound memory and discretion, and this presumption must be given effect by you until the contrary is shown or until after a consideration of all the evidence you have a reasonable doubt as to the defendant's sanity."

After the instructions had been given to the jury, appellant objected to this instruction in the following language:

> "Objection as to Instruction No. 12, that, when evidence of insanity is put into issue, it is up to the prosecution to prove sanity." (R. 601.)

Now in the briefs of appellant the claim is shifted and it is said that the language "until the contrary is shown" amounts to prejudicial error. The objection at trial did not state distinctly the matter to which the appellant now objects, or the grounds of the objection as required by Rule 30, F.R.Cr.P., and accordingly the trial court was not given an opportunity to perceive the claimed error.

Irrespective of the fact that appellant's objection was inadequate, the jury was correctly informed that if it had a reasonable doubt of the defendant's sanity after a consideration of all the evidence they were bound to return a verdict of not guilty. Instruction No. 12 must be read in context with the other instructions. Instruction No. 1 admonished the jury to consider the instructions as a whole, while Instruction No. 4 defined the burden resting on the prosecution of proving beyond a reasonable doubt every element of the crime charged. Instruction No. 8 charged sanity as an element of first degree murder, and in the last paragraph of the instruction the court said:

> "Therefore, *if you find from the evidence beyond a reasonable doubt* (1) that the defendant on or about the time and place charged in the indictment killed Paul Rivers, and (2) *that she was then*

and there of sound memory and discretion, and (3) that such killing was done purposely and with deliberate and premeditated malice, you should find her guilty of murder in the first degree. On the other hand, if you do not so find, or if all the foregoing elements have not been proved beyond a reasonable doubt, you cannot convict the defendant of murder in the first degree and you should then proceed to consider whether she may be guilty of murder in the second degree." (Emphasis supplied.)

There is nothing in Instruction No. 12 which negates the prosecution's burden of proof. It is consonant with the principles laid down in *Davis v. United States,* 160 U.S. 469 (1895), cited by appellant. It is submitted that the court did not err in giving this instruction.

VII. THE COURT'S INSTRUCTION NO. 25 THAT EVIDENCE OF PRIOR INCONSISTENT STATEMENTS OF THE ACCUSED ARE NOT SUFFICIENT OF THEMSELVES TO PROVE GUILT WAS A CORRECT AND PROPER STATEMENT OF THE LAW.

Instruction No. 25 concerning the appellant's prior inconsistent statements was taken substantially from California Jury Instructions, Criminal, No. 30-A, and it has received judicial sanction in that state for a number of years.

As indicated in the Statement of Case, Mrs. Rivers made a number of inconsistent statements concerning her husband and the circumstances surrounding his death, and these were admitted into evidence for the purpose of showing a consciousness of guilt. Wigmore,

op. cit., Vol. II, §278; *People v. Wilkes,* 284 P. 2d 481, 484 (Cal. 1955); *People v. Moore,* 160 P. 2d 857, 860 (Cal. App. 1945); *People v. Gibson,* 149 P. 2d 25, 26 (Cal. App. 1944). If it is conceded that inconsistent statements are admissible against a defendant it is difficult to understand how the restrictive language, "but it is not sufficient of itself to prove guilt," could be prejudicial. The language which the appellant objects to is actually entirely favorable to her, and the government submits that appellant's interpretation is unreasonable.

VIII. THE ADMISSION OF TESTIMONY ABOUT ORAL STATEMENTS MADE BY APPELLANT WAS NOT ERROR.

Appellant, in one of the briefs filed on her behalf, claims error in the admission of testimony about oral statements made by her around the hour of 2:00 a.m., December 8th (R. 124-129, 198-199, 241-243). In the first place these statements are not a confession. The mere phrase, "I killed him," does not amount to a complete or even partial acknowledgment of guilt by appellant. That is the only way in which the oral admissions attributed to her on that occasion vary materially from the written statement admitted in evidence as Exhibit No. 32 without objection (R. 155). Secondly, no objection to this testimony was made at trial.

Appellant suggests now that the circumstances under which the admissions were obtained were suspicious and that undue advantage may have been taken of her. The record shows what took place dur-

ing the interview by Officer Dankworth. Appellant had requested to see Dr. Beirne, the pathologist, when he returned from making his post-mortem examination (R. 124). He did not return until 1:30 a.m., shortly after which appellant was brought into the United States marshal's office. A deputy marshal, an officer of the Territorial Police, an agent of the United States Fish and Wildlife Service, and Dr. Beirne, an independent physician not connected with law enforcement, were present the whole time (R. 125, 241-243). She acknowledged that she had obtained advice from counsel (R. 125). The total interrogation did not consume over an hour (R. 198). Taken altogether, there is nothing legally or factually in the record to support a conclusion that the admission of this testimony was error, and this court should so rule.

IX. THERE WAS NO REVERSIBLE ERROR IN ADMITTING INTO EVIDENCE VARIOUS ARTICLES TAKEN FROM ROOM NO. 10 OF THE ALASKAN HOTEL.

This point is raised in one of appellant's briefs. It should be noted that no motion for the return or suppression of any of the items objected to was made before trial under Rule 41, F.R.Cr.P. Other than a passing reference made by counsel in the course of a colloquy with the court (R. 145), there is nothing in the record indicating a necessity for a motion or hearing to determine whether this evidence should have been suppressed during the trial itself. Appellant did not include this claim of error in the statement

of points on which appellant intended to rely on appeal, nor is it included in the specification of errors in either brief filed by appellant, as required by Rule 17 (6) and Rule 18 (2)(d) of this court.

But if this court feels inclined to consider the claim, an analysis of the record should be of help. The first objection to the introduction of the evidence taken from Room 10 of the Alaskan Hotel was made to Exhibit No. 16, a broken knife found in the room. The objection was on the ground that no foundation had been laid that the article had been legally seized:

> "Object to it, your Honor. I don't believe this should be introduced in evidence until the proper foundation has been made that this was legally seized. There was no arrest at this time, only an investigation." (R. 92.)

This objection was overruled and the exhibit was admitted into evidence (R. 92). Before this time Exhibits No. 12 and No. 13, a throw rug and a piece of linoleum taken from the room, had been received in evidence without objection (R. 43).

A two-foot-seven-inch piece of string taken from the room was later offered in evidence (R. 130). Defense counsel objected as follows:

> "Your Honor, I object to the string being received on the grounds that the string itself—Mrs. Rivers was so distraught at the time she couldn't have positively identified it at that time." (R. 131.)

This objection was overruled and the string was admitted as Exhibit No. 19. Subsequently a 13-foot

piece of string, a pair of scissors, a ball of string, a tablecloth, a clothing label, and a handkerchief were all identified as having been removed from the room (R. 140-144). When these items were offered in evidence appellant's counsel stated that there was no objection to any of them except the 13-foot piece of string (R. 144-146). During the course of his objection appellant's counsel stated that he moved to suppress any of the evidence concerning the string taken from the room, but this was coupled with a statement that the defendant would admit on the stand (as she did in fact, R. 488-490) that she used the string. Counsel did not apprise the court at that or any other time that he desired a hearing in order that the propriety of the seizure of any articles in Room 10 could be determined. The 13-foot piece of string was admitted as Exhibit No. 25 (R. 144). The lack of objection on the grounds of search and seizure to the other items taken from the room and admitted in evidence (Exhibits Nos. 12, 13, 19, 26, 27, 28, 29, and 30), would make the harm to defendant minimal at best.

Finally, any error that might have arisen by admitting either Exhibits No. 16 or No. 25 was rendered harmless and was cured by the testimony of appellant and the witness Gladys Maxwell. Appellant testified to the string being in the room (R. 488-490), that she put deceased's body in a box and took it to a bridge (R. 494, 514), that she bought Exhibit No. 31, a cleaver (R. 495, 529), that the broken butcher knife, Exhibit No. 16, was in the room and had already been

broken by Paul Rivers (R. 495), that she remembered carrying a box down to the beach (R. 496), that she remembered some parts of the body being on the floor of the room and awakening beside them (R. 528), and that she had told the police where to find the dismembered body (R. 534). All of this supported the conclusion that she had used the string on her husband and that she had done something in connection with the disposal of the body in the room.

Appellant called Gladys Maxwell as a witness and she testified that appellant told her in jail shortly after her arrest that she had used a string to tie her husband's hands and neck (R. 547-548) and that she had used the broken knife, Exhibit No. 16, in dismembering the deceased's body (R. 548).

In *Paddy v. United States,* 143 F. 2d 847 (CCA 9th 1944), this court had before it the same question. This was a homicide case in which it was claimed that a holster and two bottles of whiskey admitted into evidence over objection were obtained by an unlawful search and seizure. This court held that even if it were assumed that the evidence should not have been admitted, the appellant's later voluntary testimony concerning the exhibits made their introduction harmless error. 143 F. 2d at 853. To the same effect are *Libera v. United States*, 299 F. 300 (CCA 9th 1924), and *Temperani v. United States,* 299 F. 365 (CCA 9th 1924).

It follows that in the case at bar no reversible error was committed in respect to the introduction of the complained about exhibits.

CONCLUSION.

Appellant has had a trial free from prejudicial error. She was proved guilty beyond a reasonable doubt. The judgment of the court below should be affirmed.

Dated, Juneau, Alaska,
December 22, 1958.

Respectfully submitted,

ROGER G. CONNOR,
United States Attorney,
JEROME A. MOORE,
Assistant United States Attorney,
Attorneys for Appellee.